APPEAL NO. 021691
FILED AUGUST 22, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on June 3, 2002. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the 12th quarter, based on a total inability to work.

The appellant (self-insured) appeals, principally arguing the quality of the claimant's limited job search efforts, but also appealing the "no ability to return to work" findings. The file does not contain a response from the claimant.

DECISION

Reversed and rendered.

Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102) set out the statutory and administrative rule requirements for SIBs. At issue in this case is whether the claimant met the good faith job search requirement of Section 408.142(a)(4) through a total inability to work as set out in Rule 130.102(d)(4). The parties stipulated that the qualifying period at issue was from September 7 through December 6, 2001.

Although the claimant stated that he made some job contacts because the self-insured's vocational counselor and an attorney told him he was required to do so, the principal theory that the claimant relied on, and the basis of the hearing officer's decision, was his total inability to work. It is fairly clear that the claimant did not look for employment and document his job search efforts every week, as required by Rule 130.102(d)(5) and (e).

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer determined that the claimant "was unable to work in any capacity pursuant to narrative reports provided by [Dr. F]" and that the narrative reports specifically explained how the injury caused the claimant's total inability to work during the 12th quarter qualifying period.

We agree that Dr. F's June 11, 2001, and August 16, 2001, reports are minimally sufficient to provide the narrative which specifically explains how the injury causes a total inability to work, and the hearing officer's finding on that point is not so against the

great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust.

More to the point, however, is a report dated September 26, 2001 (two and one-half weeks into the qualifying period), where Dr. B, a required medical examination (RME) doctor, comments on the claimant's medical history and current condition, and concludes:

> I do not believe that [claimant] is a candidate for any type of heavy work but he may possibly be a candidate for some type of light duty which would be part time not to exceed four hours which would be basically sedentary but would allow him to change positions and move periodically. Apparently he does this in his daily routine at the present time and I think he would be capable of performing this type of duty of gainful employment.

The hearing officer dismisses this report as an "other record," stating that it "does not firmly establish that the claimant had any ability to work" and that the report "is speculative and does not outweigh the reports of the treating doctor." Rather clearly, the hearing officer applied a weighing or balancing test as to which record (Dr. F's or Dr. B's) she found more persuasive. Rule 130.102(d)(4) does not provide for such a weighing or balancing test, rather it states that for the claimant to prevail "no other records show that the injured employee is able to return to work." It was error for the hearing officer to apply such a balancing or weighing test. *See* Texas Workers' Compensation Commission Appeal No. 002670, decided January 3, 2001. Dr. B clearly and unequivocally found that the claimant's present daily routine shows that he is capable of performing the light duty Dr. B outlined. We further hold that the determination that no "other records credibly show" that the claimant could have returned to work is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

Accordingly, the hearing officer's decision and order are reversed, and we render a new decision that the claimant is not entitled to SIBs for the 12th quarter.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address if its registered agent for service of process is

SD
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert E. Lang
Appeals Panel
Manager/Judge

DISSENTING OPINION:

I respectfully dissent. I would affirm the hearing officer's decision. It is important to emphasize that in April 2001 the claimant underwent a functional capacity evaluation (FCE), in which the treating doctor reported showed that the claimant qualified for the "NO work category" in both the restricted and unrestricted work planes, and that in June 2001, the treating doctor wrote that the FCE showed that the claimant "did not qualify for any work," in unrestricted or restricted categories due to his incapacitation due to his back difficulty (it is undisputed that the claimant's compensable injury was a low back injury). The treating doctor further noted that he was recommending that the claimant seek permanent disability retirement from his employer because of the claimant's prolonged pain, disability, and inability to pass any FCE that would qualify him for employment. Considering the treating doctor's incorporation of the results of the FCE in his report, I believe that the hearing officer could reasonably conclude that the Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) requirement for a narrative report from a doctor which specifically explains how the injury causes a total inability to work had been met. The majority opinion agrees that the requirement for a narrative report has been met.

With regard to the RME doctor's report and the Rule 130.102(d)(4) requirement that no other records show that the injured employee is able to return to work, in Texas Workers' Compensation Commission Appeal No. 002196, decided October 24, 2000,

the Appeals Panel wrote that "in cases where a total inability to work is asserted and there are other records which on their face appear to show an ability to work, the hearing officer is not at liberty to simply reject those records as not credible without explanation or support in the record." In the instant case, the hearing officer explained why she did not find the RME doctor's report to be another record which showed that the claimant has an inability to work. The RME doctor prefaced his remarks regarding the claimant's ability to work by saying that "he may possibly be a candidate for some type of light duty . . . ." The hearing officer noted the tentative nature of the RME doctor's report in determining that it did not credibly show that the claimant had an ability to work. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). I believe that the hearing officer has supplied a sufficient explanation in support of her finding rejecting the RME doctor's report as a report that showed that the claimant had an ability to work.

_____

Robert W. Potts
Appeals Judge